No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),
Appellant,

vs.

H. H. PIERSON,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Statutes

Miscellaneous

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INTRODUCTORY STATEMENT.

Appellant's "statement of the case" in its opening brief (pp. 3-10) undertakes to summarize the evidence in this appeal. To the extent that appellee disagrees with appellant's analysis of the facts, comment will be made thereon in connection with the discussions of the points raised in the body of appellant's argument. Appellee will endeavor to answer the points raised in the order in which the same appear in the appellant's brief, commencing with the statement under the topic heading "Preliminary Analysis" of appellant's position relative to appellate review of findings in a non-jury case.

I. THE FINDINGS OF THE TRIAL COURT WILL BE ACCEPTED ON APPEAL WHERE THERE IS SUBSTANTIAL TESTIMONY SUPPORTING THEM AND THEY ARE BASED UPON CONFLICTING TESTIMONY INVOLVING THE CREDIBILITY OF WITNESSES APPEARING BEFORE THE TRIAL COURT.

The statements concerning the scope of judicial review appearing at pages 14 and 15 of Appellant's Brief are accurate enough, but they have no proper bearing upon this appeal. For example, in *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364; 92 L. Ed. (Adv. Op.) 552; 68 Sup. Ct. 525, cited by the appellant, the issue was whether the defendants had conspired to evade the Sherman Act. Despite the evidence contained in contemporaneous documents, the authors thereof testified they had no intention to engage in concert. The Supreme Court held in effect that the documentary evidence so clearly outweighed the pious denials of intent that the Court's action in accepting the testimony was clearly error. In short, the essential ruling was that as a matter of law the offense was proved without regard to the apparent conflict created by the testimony.

Similarly, in *Home Indem. v. Standard Accident Ins. Co.* (9 Cir. 1948); 167 Fed. (2d) 919, which is relied on by the appellants, this Court pointed out that there was no dispute that the insured had on five separate occasions delivered five separate and completely divergent versions of an accident. The trial Court's finding that this did not constitute prejudice to the insurer's defense of litigation arising from the accident was a conclusion of law, or an inference involving

a matter of law from undisputed facts. Under such circumstances it was the power and duty of this Court to resolve the question whether such conduct constituted prejudice independently of the trial Court's conclusion.

These last mentioned cases merely exemplify a simple rule—the pertinency of undisputed facts may be a matter of law. If so, to ignore such pertinent facts is an error of law.

Appellee's position is that this is not a case where the trial Court's determination disregarded any facts conclusive upon the issues as a matter of law, but that the findings relative to the character of the agreement between appellant and appellee are findings of fact based upon conflicting testimony, and that each essential fact is supported by substantial evidence.

This Court has repeatedly adopted the rule best expressed by Mr. Justice Holmes in *Adamson v. Gilliland,* 242 U. S. 350, 353; 37 Sup. Ct. 169, 170; 61 L. Ed. 356, 357:

> "* * * the case is preeminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses or so far as there is any testimony consistent with the finding it must be treated as unassailable'. *Davis v. Schwartz,* 155 U. S. 631, 636; 39 L. Ed. 289, 291; 15 Sup. Ct. 237."

Wittmayer v. U. S. (9 Cir. 1941), 118 Fed. (2d) 808;

Anglo Calif. Nat. Bank v. Lazard (9 Cir. 1939), 106 Fed. (2d) 693 (Cert. Den.);
O'Keith v. Johnston (9 Cir. 1942), 129 Fed. (2d) 889.

The principles expressed in Rule 52(a) of the Federal Rules of Civil Procedure is a formulation of a ruling long recognized in equity (*Wittmayer v. U. S.*, supra) and as is said by *O'Brien* in his *1937 Cum. Supp. to Manual of Federal Appellate Procedure* (2d Ed. p. 62):

> "Findings of the trial court, in a suit in equity, based on conflicting testimony, taken in open court, will not be disturbed on appeal."

And in its consideration and review of the evidence and the findings based thereon, every conflict in the evidence should be resolved in favor of the findings of the trier of the fact. As was said in *Smith v. Porter* (8 Cir. 1944), 143 Fed. (2d) 292:

> "The question for decision in this case is whether there is sufficient basis in the evidence for the court's findings of fact. In deciding that question we are required to take that view of the evidence which is most favorable to the appellee."

Contrary to the suggestion of appellant in its Point I (3) at page 16 of its brief, the inferences and conclusions of fact of the trial Court are not merely entitled to slight weight. A consideration of the authorities there cited, and others, demonstrates the true rule to be that if the inference is one purely of fact

to be derived from substantial and conflicting evidence, the determination of the trial Court will be accepted as binding by the Appellate Court, and that where a mixed question of law and fact exists, the Appellate Court will scrutinize the finding of fact embodying such question only to determine if the pertinent law has been misapplied to the facts as found.

Hartford Acc. & Indem. v. Jasper (9 Cir. 1944), 144 Fed. (2d) 266, 267.

A fair example of the selection by the trial Court of an inference of fact is the decision in *Occidental Life Ins. Co. v. Thomas* (9 Cir. 1939), 107 Fed. (2d) 876, where the issue was whether an insured had suffered accidental death, the deceased having disappeared from a rowboat in a lake. The trial Court determined that he had. This Court ruled that such inference being a reasonable one, it was unnecessary that all other possible inferences be excluded by the proof, for in such circumstances the trial Court's decision was not clear error. In his concurring opinion, Judge Haney pointed out that under Rule 52(a) a finding of this character is clearly erroneous only if no reasonable man could logically make such inference.

The case of *Kuhn v. Princess Lida* (3 Cir. 1941), 119 Fed. (2d) 704, is an example of an inference concerning a mixed question of law and fact. There the issue was the reasonable value of an attorney's services. The trial Court made a finding that the services involved difficult and exacting legal questions and

fixed the fee accordingly. The Appellate Court held that the nature of the services was "matter of law" on which the Appellate Court was as able to form an opinion as the trial Court. It concluded that the services, as a matter of law, were not difficult or exacting.

The case is rare where some of the findings of fact do not involve some application of law. Nevertheless in many cases this Court has accepted such findings within the mandate of Rule 52(a).

Diamond Laundry Corp. v. Calif. Emp. Stab. Comm. (9 Cir. 1947), 162 Fed. (2d) 398;

Davis v. Johnston (9 Cir. 1946), 157 Fed. (2d) 64.

But in the present case every factual inference is logically derived and insofar as the declaration of any ultimate fact involves the application of law, such law has been correctly applied.

II. EVERY ESSENTIAL ELEMENT OF THE COURT'S FINDINGS RELATIVE TO THE NATURE AND EFFECT OF THE CONVERSATION OF FEBRUARY, 1944, IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellant in its brief, between pages 16 and 23, examines, weighs and argues the effect of the testimony in this case. Its basic contentions appear to be, first, that Suewer ought to be believed because he testified by deposition, and that Pierson ought not to be believed because his testimony in Court was more detailed than that given by him on deposition.

It will be noted that the deposition of Pierson was taken by way of discovery; he was cross-examined by appellant's counsel to such extent as that counsel saw fit at that time, but he was not given a direct examination then. Any disparity between the testimony given by Pierson on the deposition and that given on trial, is not more than the difference in the detail of the questions asked.

The trial Court had Pierson's deposition before it on the stipulation of the parties (Tr. 154), as well as the whole deposition of Suewer. To the extent that there is any conflict between the deposition of Suewer and the testimony and deposition of Pierson, it was the duty and function of the trial Court to resolve that conflict. The trial Court had the opportunity to observe and hear Mr. Pierson and weigh him in its balance, and found that what he said was credible and true. Where the testimony of Suewer by deposition conflicted, patently the truth of the two versions could not co-exist. What was said at the conference of February, 1944, was therefore a doubtful issue of fact. The trial Court's resolution of that issue will not be retried here.

Anglo Calif. Nat. Bank v. Lazard (9 Cir. 1939), 106 Fed. (2d) 693, 703;

Dumas v. King (8 Cir. 1946), 157 Fed. (2d) 463, 465.

Certainly if the testimony of Pierson alone was before the Court, its finding as to what transpired in that conference would have been conclusive. (*Weber v. Alabama-California Gold Mines Co.* (9 Cir. 1941),

121 Fed. (2d) 663).) The introduction of a deposition setting forth another's contrary memory of the facts cannot change this. While this Court has equal ability to study and appraise the deposition of Suewer, standing apart from the other evidence in the case, it would be repugnant to this Court's repeated recognition of the trial judge's function and jurisdiction in questions of controverted fact to attempt to weigh such deposition against testimony given in open Court.

Hartford Acc. & Indem. Co. v. Jasper (9 Cir. 1944), 144 Fed. (2d) 266, 267.

A. A contractual obligation was created.

Both witnesses, Pierson and Suewer, are in agreement that in February, 1944 a conversation was had respecting the subject of compensation of the key men of the organization, including Pierson. It was not the first such discussion and at that time the subject of a bonus for the key men came up for discussion and Suewer stated that he would recommend it.

Beyond this, the memory of the witnesses as to the order of the discussion and its details is divergent. In view of what has been said above it is unnecessary to reexamine the testimony of Suewer, except to state generally that he expressly or by implication denied the following details stated by Pierson, and that the trial Court resolved the conflict in favor of Pierson.

Pierson stated that the measure of the bonus was to be a sum that would make up the difference between the salary actually paid, and what other companies were paying (Tr. 68, 85), and also that it would be a

sum representing fair compensation for the work being done (Tr. 84). He stated that he informed Suewer that the key men would quit unless some such arrangement could be made (Tr. 67, 217-218). He deemed himself included among the key men (Tr. 86, 87) and Suewer, so far as he confirms the details of the conversation, also understood and intended that Pierson was one of such key men (Tr. 183). Pierson, in reliance on the foregoing, carried on in his capacity as Pacific Coast manager until the end of the war (Tr. 71, 209-210), and indeed until after the payment of the bonus was actually granted (Tr. 206).

B. Whether there was an intention to contract was a question for the trial Court.

Appellant suggests that from the evidence no inference of an intention to contract can be gleaned. It must be remembered that for every purpose Suewer *was* the management of appellant corporation at the time in question. There were no limitations imposed on his authority by the general power of attorney (Tr. 128) and whatever limitations he himself imposed in his own discretion, the fact is paramount that appellant's business *had* to run, and *had* to be operated by a staff of experienced men, and implicit in the power and duty of Suewer to hire and fire was the power to *induce the experienced staff to remain* in furtherance of the business of appellant.

Since he had this power to offer inducements to retain employees, including Pierson, the question must be, was he called upon to exercise that power and

did he exercise it? For appellant has abandoned all contention that he was in fact without authority to do so (Appellant's Opening Brief, Note 3, page 11).

It will be noted that Pierson and the other key personnel were free agents in February, 1944, employed at salaries which they considered insufficient, so Pierson broached the matter with the only person able to do anything about it: Suewer, and advised him that such key personnel would quit if they didn't get some commitment (Tr. 217-218). This Court can take judicial notice of the rising pressures among competitive enterprises during the years 1943 and 1944 to obtain skilled help from a constantly diminishing employee pool in all phases of industry. Since, as both Pierson and Suewer recognized (Tr. 209), the threat of raids upon the key personnel by competitors constituted a hazard to the welfare of a business which had expanded fivefold, then a matter seriously affecting the future welfare of an organization for which Suewer was solely responsible, was the heart of the discussions; and the defeat of that threat and that hazard may reasonably be inferred to have been of the highest importance to Suewer.

Intent to contract is such an inference of fact from the testimony that it can be best inferred by the trier of the fact. (*Biggs v. Mays* (8 Cir. 1942), 125 Fed. (2d) 693, 697.) Suewer's contention that he did not intend a contract or an obligation of a contractual nature is belied by Pierson's description of the situation. It was for the trial Court to say whether the

conference was a mere exchange of generalities, or a negotiation with a serious purpose in which there was an exchange of promises expressed or implied from what was said. It was the trial Court's determination of this issue that the parties intended a bargain, and this Court will respect that determination as one made by the tribunal best able to evaluate the evidence.

C. Suewer's promise to recommend and insist on the payment of the bonus obligated the appellant.

Appellant suggests that since Suewer placed his promise on a recommendation basis that no contract could arise. Inherent in the conversation between the parties was the realization that nothing could be done about substantially increasing compensation of the key men on a current basis. (See Point IVA, infra, this brief.)

Assuming Suewer to have been in good faith in making the promises which the Court found he did make in February of 1944, he was promising something that would be performed only when his general power of attorney had been superseded by the emergence of the management from Japanese prisons at an unknown future date. Neither party contemplated a specific sum of dollars to be paid because, for the most part, the amount to be paid depended on the duration of the war and the value of the services to be rendered on the competitive market which might go either up or down during the continuing course of that war. It was then only natural that he should defer the determination of the amount ultimately to be payable

within the understanding and to transfer the actual fixing thereof to the revived management. But these considerations were subject always to the basic premise (which the trial Court saw) that he, as the management-in-fact, would recommend to the management-to-be, and *in fact would insist upon* (Tr. 68-69), the payment of a bonus based upon those standards which the trial Court found he promised to Pierson. Neither he nor Pierson had any doubt that it would be put through on that basis and, it is the clear inference, both parties considered the bargain was made and the machinery for its accomplishment was a mere formality (Tr. 68-69).

Suewer either made the promise with the intention to perform it, in which event appellant was bound, or he made it with no intention of performing it, which appellant could not be allowed to show. In either event, he did not perform his promise—for his acts fell far short of what the Court has found he promised to do (Tr. 188-190, 147-149). The board of directors of appellant accepted, apparently without question, the recommendation that he did make (Tr. 148) but they were bound as principals to act upon that recommendation which the bargain required him to make.

D. Regarding the "retroactive" adjustment of pay.

Appellant for the first time on this appeal raises a point not urged either at the trial nor on the motion for new trial at which the lower Court reconsidered its judgment. Appellant states that the Court's finding Number 5 (Tr. 29), granting to appellee an addi-

tional sum of money based upon the worth of his services throughout the war period from December, 1941 to August, 1945 is without support in the evidence. There is nothing repugnant about an agreement that contemplates the payment of a sum measured by other standards than future performance alone. The measure of appellant's responsibility in this case is what was promised on its behalf and not the consideration required to be performed by appellee in order to receive performance of appellant's promise.

The following facts are significant as bearing upon this phase of the matter:

First, Suewer told Pierson that such would be the standard upon which the bonus would be granted (Tr. 68, 210).

The conversations of February, 1944 were apparently the culmination of a series of conversations which had occurred prior thereto regarding the increasing need for salary adjustments in view of the salaries paid by competitors (Tr. 67, 69, 182).

The increase of salaries obtainable by application to the Salary Stabilization Unit was recognized by both parties to be insufficient to prevent the draining off of key men by more attractive offers from other firms with higher pay brackets preexisting the freezing orders (Tr. 167, 209).

The program involved was not only to satisfy Pierson but to take care of a group of key employees, including Pierson, and so involved the whole personnel program of the firm (Tr. 67-68, 209-210).

Suewer is in agreement that the bonus to be recommended would cover services rendered throughout the war period (Tr. 183) and in this connection the basis upon which he fixed the bonus actually granted was the *entire war period* (Tr. 173, 194).

The object apparent in these negotiations was to hold together a staff of experienced personnel. It is not unreasonable to infer that Suewer, in his judgment as the sole manager of the entire operations of the company, was willing, as he stated, that the company should pay a bonus that would bring that staff to parity with its competitors throughout the war period, if by making such an agreement he could solidify his team of key men for the duration of the war.

This Court will take judicial notice that in February, 1944, there was no reason to anticipate the early termination of that war, and even our highest commanders did not expect the enemy to collapse until that collapse became imminent after Hiroshima. For all that, Suewer, or the General Staff of the United States Armed Forces, knew in 1944, Suewer was agreeing to a "retroactive adjustment" of 2 years pay in order to bind his principals and its executives together for 5 years or more in the future. Under such circumstances such a bargain cannot be held to have been an unreasonable or unsound one, but may well have appeared to appellant's manager what "the object of the contract was reasonably worth." (Sec. 1611 *Civil Code of California),* as the trial Court found.

E. The valuation placed upon plaintiff's services by the trial Court finds ample support in the evidence.

The nature of Pierson's services is extensively set forth in the transcript (Tr. 53-54, 58-67), as are his qualifications (Tr. 50-52), his reputation therein (Tr. 92, 93) and the quality of his work (Tr. 103-104).

Pierson, who was certainly qualified to express an opinion as to the value of his own services, placed them at $1,000 per month throughout the war period (Tr. 139-140). The witness Parkinson, general manager of several steamship companies, evaluated the services testified to by Pierson at a minimum of $12,000 per annum (Tr. 95) and as being in a bracket of $10,000 to $15,000 per annum for the period 1940-1947 (Tr. 97).

To the extent that Suewer contended that Pierson was inefficient and unsatisfactory as an employee (in explaining his reasons for setting Pierson's bonus at $2,500) (Tr. 195), the trial Court answered that contention during the oral argument by pointing out that in such case it should have been Suewer's duty to discharge him. Appellant offered no evidence whatsoever concerning the value of Pierson's services in rebuttal and no reason appears why it was not in at least as good a position to procure and produce testimony on this point as was appellee. There being substantial evidence in the record to justify the Court's determination of Pierson's worth at $1,000 per month, appellant cannot be heard now to complain that the trial Court was without specific further testimony upon this subject.

Moreover the Court could and apparently did consider, apart from the foregoing specific evaluations made of the worth of Pierson's services, the fact that Pierson assumed the duties of Bradford, his superior, in February, 1942, who had been receiving $900.00 per month (Tr. 75, 124, 177) and the fact that there was a four to fivefold increase in the volume of the work (Tr. 65).

The Court could and undoubtedly did also consider the evaluations contemporaneously placed by Suewer and the directors on the value of his work and that of Griffin, Pierson's opposite number in the East Coast office, who filled in for Suewer during his absences (Tr. 185-187). Suewer drew a prewar salary of $1,000 per month through the war period and he then demanded and received a bonus bringing his pay through the war period to $40,000 per year (Tr. 69, 176-177). Griffin was paid a bonus of $26,500 for the same period over a base salary of from $750.00 to $850.00 per month (Tr. 185). From these examples alone the Court could form its estimate of the reasonable worth of Pierson's services to the same company in his own sphere, and the relative enlargement of that worth in view of the duties and services described by him.

Appellant goes further, however, and asserts that the testimony was as to the value of Pierson's services; that the agreement testified to was to base payment upon salaries prevailing in other steamship companies, and that the Court's finding as to what was promised was based upon the reasonable value of the services performed by plaintiff for defendant during the war

period. Appellant concludes that therefore the findings are without support.

It appears to appellee that while there is certainly an abstract difference between the two categories: First, what others are paying for services, and second, what the individual is worth, yet in the present case, on the evidence, there is no difference between these categories in fact. The testimony of Parkinson, based upon his experience, of the general worth of the services tallies closely with that of Pierson as to the specific worth of his own services.

It is apparent too, from Pierson's testimony, that he and Suewer contemplated that the two standards were identical in their own minds at the time the agreement was made:

> "It (the amount) was always based upon what would be fair compensation for the work we were doing under the circumstances we were working * * * the thing was discussed on the basis of what we would shoot at. No actual amount was stipulated * * * it would be on the basis of the salaries we should have received in comparison with what other steamship companies were paying." (Tr. 84-85, parenthesis inserted).

The trial Court, too, accepted these standards on the evidence before it, as amounting to the same thing and expressed its findings in terms of the reasonable value of Pierson's services. This Court will look beyond the formal language of the trial Court's findings to determine the true intent, and if the result is supported by the evidence they are not "clearly errone-

ous'' within the meaning of Rule 52 (a). *Weber v. Alabama-California Gold Mines Co.* (9 Cir. 1941) 121 Fed. (2d) 663, 664; *Plack v. Baumer* (3 Cir. 1941) 121 Fed. (2d), 676.

Appellant places much of its argument with reference to the asserted error in evaluating Pierson's work upon its assertion that during the year 1942 the company's business was substantially stalled and that there was a lull in the activities of the corporation. It is probable that from the time the Maritime Commission took over appellant's ships until approximately September of that year when a contract was obtained with the War Shipping Administration that its affairs could not have gone with the speed with which they later did. We call the Court's attention, however, to the statistics contained in the letter of the corporation to the Treasury Department on March 16, 1945, (Plaintiff's Exhibit No. 4) (Tr. 118-119). It is apparent that the volume in 1942 exceeded the volume in 1941 *by 2½ times* while its disbursements were increasing only slightly. Appellant does violence to the facts in intimating that Pierson sat behind a desk and did nothing during the entire year of 1942.

Moreover, appellant itself took no cognizance of the ''lull'' which it now asserts, when, in making the ''adjustment of compensation'' (Tr. 151) for Suewer, it paid him $40,000.00 per annum for 1942 as well as all other war years. The state of the evidence is not such as to justify a claim of ''clear error'' with regard to the reasonableness of the trial Court's valuation of Pierson's 1942 services.

The case of *Kuhn v. Princess Lida,* (3 Cir. 1941) 119 Fed. (2d) 704, cited by appellant, is not authority for the proposition that this Court will in each instance where reasonable compensation is an issue in the case, take the determination of that matter out of the hands of the trial Court. It is pointed out earlier in this brief, (see Point I, supra), that the services evaluated in that case were legal services and as such the Appellate Court was in at least as good a position to evaluate them as was a trial Court. The factual issue in the present case is more nearly like the question of fair market value of corporate stock as stated in *United States v. State Street Trust Co.* (1 Cir. 1942), 124 Fed. (2d) 948, 950,

> "* * * the existence of fair market value is the kind of a question on which the reviewing Court should not be substituted for the fact finding tribunal."

III. AS A MATTER OF LAW, THE CONVERSATION OF FEBRUARY, 1944, CREATED A BINDING OBLIGATION.

Appellant has professed confusion as to whether appellee sought to establish an express or an implied contract or to base his claim on quasi-contractual principles. Appellee relies upon an *agreement,* orally and informally arrived at, in which every essential element was covered by the conversation of the parties and the inferences necessarily and reasonably flowing therefrom. In adverting to quasi-contractual principles, appellee intends to illuminate the contractual

nature of the bargain and to demonstrate the fundamental equity and propriety of that bargain.

The trial Court's original Order for Judgment (Tr. p. 16), its original Findings of Fact (Tr. 17-20), its Order Granting Motion for New Trial and Directing Judgment for Plaintiff (Tr. p. 24), and its final Findings of Fact (Tr. 25-31), taken together demonstrate that there was never any question in mind of the trial Court but that if any theory existed upon which the representations or misrepresentations of Suewer could be deemed to constitute an exchange of promissory considerations, it was prepared so to find.

It is clear from an examination of the Court's actions in this respect that the trial Court decided on motion for new trial that it had not given full significance on the one hand, to the inherent freedom of Pierson to quit his job and on the other hand, to the broad power and, indeed, the duty of Suewer to act on behalf of the defendant corporation to avoid the possibility of losing its key men by making adequate provision for their proper compensation.

Epitomizing the argument made to the trial Court on the Motion for New Trial, the following points are urged as persuasive here: First, that it would be an unjust enrichment to permit the defendant to enjoy the benefit of plaintiff's services, reasonably worth $1,000.00 per month (see Point II E., supra) for a substantially lesser sum, when plaintiff was induced to remain in the employment of defendant in reliance upon certain promises of Suewer, sufficiently clear in

and of themselves, to enable a Court to enforce them. Otherwise, under such circumstances, defendant would be taking advantage of the wrong of its own manager. *Restatement of the Law of Restitution,* Sec. 1; *Restatement of the Law of Agency,* Sec. 457.

A person cannot retain the benefit of a transaction conducted by his agent and yet deny the authority of the agent.

Ray v. Amer. Photo Player Co., 46 Cal. App. 311, 189 Pac. 130;

Moody v. Boas Finance Corp., 93 Cal. App. 21; 268 Pac. 974;

See also *Sec. 1589 of the Civil Code of the State of California.*

If Pierson had worked for another and Suewer had induced him to go to work for appellant in February of 1944, for the salary available under the salary stabilization laws, plus a bonus of the character indicated by the testimony here, there is no doubt that such arrangement would have been binding upon the defendant. No reason exists in law why any different rule should prevail simply because Pierson was currently employed at the time the understanding was reached, when he was free to discontinue that employment at any time.

And if, as is the rule in California, a promise will be construed out of the mere rendition and acceptance of valuable services, to pay at least the value of those services, (see *Mayborne v. Citizens Bank,* 46 Cal. App. 178, 188 Pac. 1034; *Leoni v. Delaney,* 83 Cal. App. (2d)

303, 188 Pac. (2d) 765; *Crane v. Derrick,* 157 Cal. 667, 109 Pac. 31; *Medina v. Van Camp Sea Food Co.,* 75 Cal. App. (2d) 551, 171 Pac. (2d) 445), the rule cannot justly be otherwise when the parties delineate the terms thereof with the particularity which the trial Court found here.

IV. THE CONTRACT WAS NOT ILLEGAL.

Appellant, in contending that the trial Court's Findings Nos. 5 and 11 are inconsistent, relies on a series of inferences to arrive at the conclusion that payment under the contract was to be made within a reasonable time after the termination of the war without reference to the termination of salary controls.

While Finding No. 5 is silent in regard to the termination of such controls, Finding No. 11, the more specific and hence the controlling finding, negatives any inference that the parties bargained in complete disregard of this factor in the view of the trial Court. If any superficial divergence appears to exist between the two findings, No. 11 (Tr. 31) should be taken as the finding expressing the trial Court's determination of the issue of fact involved. The mere apparent inconsistency of the two findings does not constitute fatal error unless the ultimate determination of the trial Court—that this agreement contemplated payment only after the termination of salary controls—does not find support in the evidence.

A. The logical inferences from the facts support the trial Court's finding that payment would not be made until after the termination of controls.

The logical inference, in light of the evidence and the background in which the parties bargained, was that the concept "the termination of the war" necessarily included the lifting of wage and salary controls as part of what that phrase meant to the parties.

Appellant asserts (appellant's brief, p. 31) that the only factor which the parties considered as delaying payment was the necessity of communicating with the home office in Manila. While this was a factor influencing the form the agreement took, it is absurd to say that it was the only factor. It is obvious from a consideration of the record as a whole that the parties contemplated the end of the war as the only point by which the promise could be measured in dollars, and hence only after that time could the agreement be consummated.

The following facts are significant in determining what the parties contemplated as to the time and occasion for the actual payment of the bonus:

The *whole reason* for the February 1944 discussion was that because of the existence of salary controls, appellant could not pay its employees salaries equal to those offered by its competitors who had established higher bases and that the securing of approval under the stabilization laws of any increase was difficult. (Tr. 209);

Both Suewer and Pierson knew of the requirements of the Stabilization Act of 1942 and of the necessity

of securing the consent of the Commissioner of Internal Revenue before any salary increases were paid, as this procedure was carried out a number of times during the war under the joint auspices of Pierson and Suewer. (Tr. 66, 167, 175, 208, 211);

The language used by the parties to describe the time contemplated for performance was "after the war (is) over" (Tr. 183); "when the war is over" (Tr. 184); "after the war (is) over or when the shooting stop(s) anyway." (Tr. 209); "at the end of the war" (Tr. 83).

The contemporaneous interpretation by the parties, that is, their acts relative to the performance of the agreement in issue, demonstrates their own interpretation of what their agreement was. It will be noted that Manila was recaptured in early 1945. The surrender occurred in August, 1945. Communication with Manila was restored in late 1945 (Tr. 171), but it was not until March of 1946 when Suewer first went to Manila to account for his stewardship of appellant's affairs that the subject of war time bonuses came up for settlement with the management. (Tr. 171-172, 187-190). And it was not until July of that year that any bonus was paid. Neither of the parties appeared disturbed or concerned over this slow course of affairs (Tr. 71-72, 220).

It is a fair reference to this Court's knowledge of general affairs that in the mid-war period of February, 1944, the general thinking of business men, whether correct or not, was that the termination of hostilities

would bring about the prompt termination of those temporary restrictive controls enforced for the furtherance of the war effort. The "end of the war" as used by business men, was a concept that included a vastly broader scope than the firing of the last shot. In February, 1944, Pierson and Suewer, as reasonable men, must have foreseen as probable the chaos of Manila after the war and the long period of Army restriction during which nothing but the most essential business could be carried on there. The facts and the conduct of the parties in relation to the consummation of the bonus agreement bear out this thought.

Appellant has pointed out (appellant's brief, page 32) that a large number of the war-time economic controls continued for a substantial period beyond the end of combat warfare and attempts to demonstrate in this way that the termination of the war is not equivalent to the termination of salary controls. The logic relied on here falls far short of its mark, however, because it attempts to impose hindsight upon the agreement. We are not here concerned with niceties of definition but rather with an attempt to determine what the term "the end of the war" meant to the parties at *the time the agreement was entered.*

It is perhaps well to note at this point that Sec. 6 of the Act (56 Stat. 767; 50 U.S.C. App. Sect. 966) provided, at the time of the contract, February, 1944, that the provisions of the act (including salary controls) *should terminate on June 30, 1944,* or on such earlier date as Congress or the President should prescribe.

It may be argued that it was generally understood at the time that Congress might re-enact such war legislation from year to year as the war continued, but it was also generally understood that when warfare terminated, such controls would be terminated. In light of this well recognized background, it is incorrect to say, as appellant has done (appellant's brief, p. 32), that it was a mere "coincidence" that wage and salary controls were lifted four days after the cessation of hostilities.

On the foregoing state of the record, it is impossible to say, with appellant's assurance, that this agreement contemplated the payment of any sum in contravention of the Salary Stabilization Act of 1942 or, indeed, of any extension thereof. The substantive rules of reasonable construction in force in California with regard to time of performance require the Court to consider what time would be reasonable in view of the situation of the parties, the nature of the transaction and the circumstances of the particular case. *Kersch v. Taber,* 67 Cal. App. (2d) 499, 506; 154 Pac. (2d) 934.

It cannot be said that the parties clearly contemplated, in spite of all possibility of legislative inhibition, to pay and receive the bonus on any fixed date. Rather, it is fairly to be said that the parties contemplated an honorable bargain under which the payment following the determination of the amount due was to be made only in accordance with law; that the parties considered the salary control legislation to be temporary, existing only until the end of the war (as in fact it did); and finally, that the parties contem-

plated that such bargain would be free of legislative inhibition when the time for performance arrived and that such freedom was an implicit term of the bargain because both knew that while such controls existed "it was very difficult to get approvals from the various Government bodies." (Tr. 209).

Unless no reasonable man could logically infer that this was the intention of the parties, this Court cannot say that the trial Court's finding was "clearly erroneous." *Occidental Life Insurance Co. v. Thomas,* (9 Cir., 1939), 107 Fed. (2d) 876.

B. Substantive law required the trial Court to interpret the contract only as requiring payment when lawful.

The language used by the parties, it is submitted, is not so tightly worded or so absolutely clear in its intendment as to require a construction that would make the contract illegal, if by a reasonable construction, that result will not follow. California accepts the general rule which has been stated as follows:

> "Where a contract could have been performed in a legal manner as well as an illegal manner, it will not be declared void because it may have been performed in an illegal manner, since bad motives are never to be imputed to any man where fair and honest intentions are sufficient to account for his conduct."
>
> 12 *Am. Jur.* 647;
>
> *Robbins v. Pac. Eastern Corp.,* 8 Cal. (2d) 241, 272; 65 Pac. (2d) 42, 58.

The rule is given statutory expression in California in two sections of the Civil Code.

"*Interpretation in favor of contract.* A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Sec. 1643 Civil Code);

"An interpretation which gives effect is preferred to one which makes void." (Sec. 3541 Civil Code).

It was the duty of the trial Court to consider the language used by the parties not only in the light of the circumstances surrounding the situation, but also in the light of the foregoing principles of construction. It was not error for the trial Court to select that interpretation of the language used by the parties consistent with the principles of law stated above.

C. The salary stabilization laws did not forbid this contract expressly or by implication.

Appellee will endeavor first to distinguish the authorities cited by appellant and then proceed to an examination of the Stabilization Act of 1942, the regulations issued under it and the pertinent authorities controlling its application here.

1. The cases cited by appellant are inapplicable.

It becomes apparent from a reading of the authorities cited by appellant under Sect. B of Topic VI that they are not proper authorities for the proposition that appellant seeks to establish, i.e., that the contract in the instant case is illegal and void.

Appellant has stated a general rule to the effect that a bargain for an illegal act is itself illegal and a subsequent change in the law permitting such an act does not restore validity to the agreement. (Appellant's brief, pp. 33-34). We do not contend that this rule is incorrectly stated but emphatically contend that it is inapplicable in this case. Indeed, the very authorities relied on by appellant go on to state the rule properly applicable here:

> "It would seem that where an agreement is made with reference to a contemplated change in the law and is not executed until such change is effected, it is perfectly legal." (126 A.L.R. 701).

> "In general, bargains voidable or unenforcible because made under a prohibitory statute (where the bargain is not regarded as involving serious wrong) or under an inoperative statute, or because there was no statute authorizing such bargain, are deemed validated by repeal of such prohibitory statute or by subsequent statutes enacted expressly to cure the defect, provided the legislature could have authorized or permitted the making of such contract in the first instance." Williston on Contracts, Revised Edition, Volume 6, Sect. 1758.

The California cases cited by appellant (appellant's brief, p. 34) do not serve as authority for the points which appellant seeks to establish. The essential distinguishing feature of the line of cases exemplified by *Smith v. Bach,* 183 Cal. 259, 191 Pac. 14, is that the acts in question were clearly and incontrovertibly in violation of the particular statute. Appellant has not

established that such is the case here. Likewise, the rule of *Willcox v. Edwards,* 162 Cal. 455, 123 Pac. 276, is applicable only where it is first established that a particular act is prohibited by statute.

A careful reading of *In re Pringle Engineering and Manufacturing Co.* (7 Cir. 1947), 164 Fed. (2d) 299, on which appellant relies so heavily, discloses that it can be distinguished from the instant case in material respects. The question under consideration in that case involved an agreement to pay a bonus on sales, such bonus to be "* * * figured and paid at the end of the year; * * *" (i.e., 1945). On application to the Salary Stabilization Unit, the Commissioner withheld approval of the bonus plan, directing that application be made again when the bonus payments were to be made. Salary controls were lifted August 18, 1945. The employer was declared bankrupt October 9, 1945. The employee filed a claim for the amount assertedly due under the bonus arrangement, which claim was disallowed by the referee in bankruptcy. The Appellate Court upheld the action of the referee.

A critical distinction between the bonus arrangement here and that in the *Pringle* case is that in that case the agreement of the parties contemplated the payment of a bonus at the end of 1945, without regard to the termination of the war or the abolition of salary controls. The agreement of the parties flatly called for such a payment. It was pure coincidence that salary controls were abolished prior to the due date of payment. The Appellate Court pointed out at p. 301 of

its decision that in view of the employer's insolvency it was apparent that had salary controls remained in force until the time when payment was to be made under the parties' agreement, there would not have been the slightest chance that approval would have been given by the Commissioner. The Court stated that the possibility of approval under such circumstances was "too remote for even speculation".

The case is readily distinguishable from the present situation. Here it is a fair view of the parties' bargain that they contemplated no payment until a time when in view of the policy and purpose of the salary stabilization laws they had a right to assume that those controls would either have been entirely removed, as in fact they were, or else would have been relaxed because of the end of the war, to the extent that approval of such a bonus was a likely possibility.

2. The contract made by the parties is in violation of neither the letter nor the spirit of the Stabilization Act of 1942.

Appellant has gone to some length in attempting to point out that the parties could not lawfully contract, under the Stabilization Act of 1942 and the regulations thereunder, for additional compensation payable after the termination of salary controls. Appellant's reasoning is based largely on a purported analysis of the economic consequences of allowing such contracts to be enforced. The weight to be given the language of the Act and the regulations is minimized by appellant in its treatment of the subject.

It is recognized that the Act itself does not condemn the making of this or any other type of contract. Significant portions of the Act are here set out:

> "In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities:" (Sec. 1, 56 Stat. 765; 50 U.S.C.A. App. Sec. 961.)
>
> "(a) No employer shall pay, and no employee shall receive wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation." (Sec. 5, 56 Stat. 767; 50 U.S.C.A. App. Sec. 965.)

The penalties of Section 11 relate to the above provisions of the Act as does Treasury Decision 5295, sub-part G, 8 Fed. Reg. 12428; C.F.R. 1943 Supp.,

Title 32, page 1238, which deals with the effects of unlawful payments.

> "Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment. (Sec. 11, 56 Stat. 768; 50 U.S.C.A. App. Sec. 971.)"
>
> "* * * (a) Sec. 5(a) of the Act provides in effect that the President shall prescribe the extent to which any salary payments made in contravention of regulations promulgated under the Act shall be disregarded by executive departments and other governmental agencies in determining the costs or expenses of any employer for the purpose of any other law or regulation. In any case where a salary payment is determined by the Commissioner to have been made in contravention of the Act, the entire amount of such payment is to be disregarded by all executive departments and all other agencies of the Federal Government. * * *
>
> "A payment in contravention of the Act may be disregarded for more than one of the foregoing purposes." T. D. 5295, sub-part G; 8 Fed. Reg. 12428; C.F.R. Supp. 1943, Book 1, Sec. 1002.28.

In a regulation issued by the director of the Office of Economic Stabilization, Section 4001.10, 10 Fed. Reg. 11962; C.F.R. Supp. 1943, Book 2, Section 4001.10, it is provided:

"In the case of a salary rate * * * no increase shall be made by the employer except as provided in regulations, rulings, or orders promulgated under the authority of these regulations * * *

"Except as herein provided, any increase * * * shall be considered in contravention of the Act * * * *from the date of the payment* if such increase is made prior to the approval of the Board or the Commissioner. * * *" (Italics ours.)

It is apparent from a consideration of the foregoing that the Act is designed to prevent the *paying* or *receiving* of increased compensation without the prior approval of the proper Federal authorities.

The Supreme Court of Massachusetts considered this problem in the case of *Nussenbaum v. Chambers & Chambers, Inc.*, ... Mass. ....., 77 N. E. (2d) 780. At page 782 the Court disposed of the problem in this way:

"We do not believe that the policy of the Wage Stabilization Act rendered illegal the mere act of entering into an agreement for an increase in salary or wages which might be approved by the proper Federal authority before the time agreed upon for actual payment. It would seem that in the orderly course of events negotiation and agreement would commonly precede approval. A rule based upon a contrary expectation would be needlessly harsh in its effects upon many wage earners and salaried persons who had no intent to violate the law. We have no doubt that such a rule would be contrary to the actual practice under the Act in a great number of instances.

The policy of the law would be fully sustained if approval were obtained before payments were made.

"The language of the Wage Stabilization Act lends itself readily to this interpretation. The prohibitions of the Act were specifically directed against paying or receiving wages or salaries and not against the making of executory agreements."

Not only did the "orderly course of events" dictate that "negotiation and agreement would commonly precede approval", but it will be remembered that in order to file an application for authority for wage increase, it was practical prerequisite that the parties to the application had entered a binding contract for such increase. (See Executive Order No. 9250, Oct. 3, 1942; Title II(1); 50 U.S.C.A. App., Section 901 Note; 7 Fed. Reg. 7873.

At page 36 of appellant's brief this language appears:

"The absence of authority is a strong indication that such bargains were not thought lawful, for it takes little imagination to foresee widespread use of such a device to evade the salary stabilization laws, if such contracts were thought valid."

Passing for the moment the validity of appellant's argument as to what is indicated by the absence of authority, it is apparent that appellant has taken the position at the outset that such contracts *evade* the

Salary Stabilization Act *whether or not* they be valid or be "thought valid". It is submitted that if such contracts are valid, they do not evade the law. This Court is not asked to countenance or foster an evasion of the law. The law forbids *payment* without prior approval. If the violation of which appellant warns us constituted such a disastrous threat to the war economy, why did not the Congress provide that such contracts constituted violations of the Act?

As to the absence of authority on this question, it is obvious that appellant's reasoning is a weapon which cuts both ways. It is just as logical to say that such bargains were thought lawful and were, therefore, consummated without recourse to litigation being necessary to force the reluctant employer to live up to his bargain. This Court is not required to guess which of these hypotheses is correct, but will determine Congress' purpose from the wording of its statute.

Relative to appellant's treatment of the economic consequences of such agreements, it is submitted that such a highly conjectual analysis need not be indulged in to determine if this contract is violative of either the spirit or the letter of the Act. If appellant's approach to the problem were adopted the test of the validity of such an agreement would be in essence, "Would it lead to postwar inflation?" Clearly this was not the test anticipated by Congress. Nothing in the Act itself or in the regulations issued under it justifies such a sweeping criterion. The control of current inflationary forces was admittedly a para-

mount factor considered by Congress at the time the legislation was enacted, but only as part of a basic and salient purpose to "aid in the *effective prosecution of the war.*" The very fact that these controls were removed within four days of the actual cessation of hostilities, and were never revived by Congress, is indicative of the Act's true purpose.

Appellant's arguments that such transactions are invalid because inflationary are nothing more than its unsupported opinions. When appellant asks this Court to rule that such contracts although not in violation of the Act are bad because inflationary, it is asking this Court to establish a policy rule of law by judicial legislation that the Congress of the United States has repeatedly refused to enact ever since August, 1945.

It ill behooves appellant to recoil in horror from the inflationary tendencies of paying Pierson a bonus of under $10,000.00, when in the same breath it admits that it compensated eight of its other employees at the very time he was entitled to his bonus in the total sum of approximately $130,000.00 for their wartime work. In what category does appellant place this disbursal of its wartime profits in view of its professed interpretation of the spirit of the wartime controls? It would be interesting, if impertinent, to inquire whether it claimed no credit for these expenditures under any federal tax, or any other law. It is true that these last mentioned considerations are not governing on the issue but they emasculate any pretensions of sincerity on the part of appellant in urging

that the bargain reached here violated the law because payment under it would be inflationary.

It is the general and well accepted rule that it will be presumed that an act is done in a lawful manner. Or stated somewhat differently, the burden of proof lies with the party urging that a contract was for an illegal act.

California Code of Civil Procedure, Sect. 1963 (33) lists as a presumption, effective in this state: "That the law has been obeyed."

The case of *Pappas v. Delis,* 79 Cal. App. (2d) 392; 181 Pac. (2d) 61 (hearing denied California Supreme Court; Cert. Den. U.S. Supreme Court 332 U.S. 808; 68 S.C. 107) involved an action for the sale price of onions. Defendant relied on the defense that the purchase price was contrary to OPA regulations. The Court pointed out that it did not appear on the face of the contract that it was illegal and void and that the defendant did not sustain the burden of proving illegality as he did not introduce evidence on each point on which the contract could possibly have been shown to have been legal. In the instant case, there is nothing to show that the parties contemplated performance of the contract in an illegal manner. For instance, it was not shown that they did not contemplate submitting the agreement for additional compensation to the Commissioner for approval, if controls in some form were in effect when payment became due.

The case of *Nussenbaum v. Chambers & Chambers, Inc.*, ... Mass. ....., 77 N.E. (2d) 780 used this language in discussing the very problem at hand:

> "No doubt an agreement to perform an illegal act is commonly an illegal agreement, but the difficulty in applying that doctrine here is that we do not think that any agreement to perform an illegal act is shown as a matter of law. The burden of proof was upon the defendant. * * * There was nothing that compelled the jury to find that the parties intended that the increased bonus should be paid at the end of the year, regardless of approval. Such intent to violate the law is not to be presumed." (P. 783).

Although *Gelb v. Benjamin,* 78 Cal. App. (2d) 881, 884; 178 Pac. (2d) 476, 477, involved a contract made prior to the effective date of the Stabilization Act of 1942, and the defense of illegality was not pleaded on trial, the language of the Court in regard to the burden of proof in cases of this sort is highly pertinent here. In that case the Court cited with approval the following language appearing at 6 *Cal. Jur.* p. 487:

> "Especially must a party who would upon this ground repudiate a contract into which he has entered, and which has been fully executed by the other party, make his right to such defense manifest, not only by alleging the facts constituting illegality, but also, if the terms do not disclose illegality, by negativing the existence of any facts or circumstances under which the contract could be held valid."

See also *Leick v. Missouri Plating Co.,* ..... Mo. ....., 211 S.W. (2d) 77.

A further consideration is that the defense of illegality as urged by appellant in this case is a basically inequitable one. It is clear that the De La Rama Steamship Company accepted the benefits of Pierson's services during the period of time in question. The company is now in a position whereby it seeks to retain a portion of the earnings due Pierson and attempts to justify this retention by arguing in effect that it should have obtained the approval of the Commissioner for the bonus arrangement but failed to do so. The attitude of the California Courts towards such a situation is clearly indicated in *Thacker v. American Foundry,* 78 Cal. App. (2d) 76, 81; 177 Pac. (2d) 322, 325.

It must be admitted that if such contracts for additional compensation are illegal, payment of such additional compensation for services rendered during the period in which the Stabilization Act was in effect would be just as clearly in violation of the act. The appellant vigorously cries for the protection of the Court because of the asserted illegality of the Pierson contract and at the same time offers as its principal exhibit the testimony of Suewer, a man to whom it paid $102,000 added compensation for his services during the war years (Tr. 151, 177) when by its own proposed theory such payment was entirely illegal. Appellant cannot sincerely believe the argument it tenders to the Court, and on the principles set forth above, neither can this Court.

CONCLUSION.

Appellant has attacked from every conceivable angle a rather simple agreement, the basic facts of which the trial Court had no difficulty in comprehending. It is respectfully submitted that all of its contentions have been completely disposed of in this reply brief.

Dated, San Francisco, California,
January 13, 1949.

Respectfully submitted,
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